

Court Tosses Out Communities' Land Use Regs in Favor of Developer

By Eric Peterson



Thomas Jay Hall



Robert Axel Kasuba

HACKENSACK, NJ-In a ruling with wide implications in the state, the Superior Court of New Jersey here has struck down land use regulations of the towns of Carlstadt and East Rutherford, as well as those of the New Jersey Meadowlands Commission (NJMC), a state agency. The judgment was in response to an action brought by Tomu Development Corp., and apparently paves the way for development of a mixed-use project on several adjacent sites along the Hackensack River.

At issue is housing, specifically affordable, and in his judgment Judge Jonathan N. Harris ruled that the two communities "have engaged in patterns of exclusionary zoning that violate the New Jersey Constitution as interpreted in the Mount Laurel cases, their progeny and the Fair Housing Act of New Jersey. The municipalities contend they are not responsible for the alleged abdication of constitutional responsibility because they enjoy neither the power to zone plaintiff's land nor to affect the vast acreage within their municipal boundaries that is within the preeminent zoning authority of co-defendant New Jersey Meadowlands Commission."

Also at issue is NJMC's planning authority of the Meadowlands region. On that matter, Judge Harris concluded that, "the municipalities have failed to comply with their express obligations to provide realistic opportunities for affordable housing within their borders, and that the NJMC has implicitly fostered the long-standing municipal failures through its benign neglect of the housing needs of the poor."

"Where other governmental actors have failed to conform their conduct to the dictates of the Constitution, it becomes the duty of the judiciary to order remediation," Judge Harris wrote. "Additionally, plaintiff is entitled to a builder's remedy because none of the defendants has demonstrated that the site is environmentally constrained, that construction of a high-density mixed-use project would represent bad planning, or that plaintiff has prosecuted this action in bad faith."

Judge Harris also ordered officials in both communities to "immediately prepare comprehensive compliance plans."

"This case is tremendously important," says Thomas Jay Hall, who chairs the Land Use and Zoning group at the law firm of Sills Cummis Epstein & Gross, Newark. Hall and colleague Robert Kasuba represented Tomu, a New Jersey-based developer headed by managing partner Joseph Murphy. The

latter once owned all of the New Jersey Better Homes and Gardens franchises before selling them to Cendant.

"For the first time, the Meadowlands will take an active role in addressing the needs of the unhoused poor," Hall says. "Until this case, many of the Meadowlands communities may have thought themselves exempt from the constitutional obligation to provide housing."

"The decision does not reflect the aggressive moves we have made toward affordable housing in the Meadowlands in the past four years," says a spokesman for the NJMC. "From grants to 14 municipalities to gain COAH certification, to inclusion of affordable housing in the \$1-billion Encap [golf course] project, as well as changing zoning regulations to ensure COAH obligations are met, the NJMC will continue to spearhead quality redevelopment and affordable housing."

"In March, we will host an affordable housing summit that will bring business leaders, local officials and a full array of stakeholders to the same table to further increase the number of affordable housing units that we can achieve with the large build-out potential of the Meadowlands redevelopment areas," the spokesman says. "Through the commission's consensus-based approach, as opposed to the judge's apparent preference for adversarial land use and his problematic approach to infrastructure, the Meadowlands market will be one that serves New Jerseyans of all income strata."

The court's ruling clears the way for a project encompassing 840 residential units, 140 for low- and moderate-income persons, along with 38,000 sf of "ancillary development" (commercial space), recreational facilities including an existing marina, meeting rooms, a riverfront promenade and public parking. The adjacent sites owned by Tomu total 27 acres, five in Carlstadt and 22 in East Rutherford. About 3.6 acres in Carlstadt and 5.3 in East Rutherford are developable--the rest is wetlands.

The project traces to a 1989 proposal by another developer that would have included more than 1.3 million sf of mixed-use space, including residential, which at the time was permitted. Regional land-use regulations since overlaid by the NJMC don't permit residential development and Tomu, which had subsequently acquired the land and proposed a scaled-back project, filed suit in August, 2003, leading to this week's judgment.